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FAX COVER SHEET

Date: August 2, 2007.

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From:
[ ] Madam Justice L. C. Leitch, Regional Senior Justice
[ ] Penny Marr, Regional Manager, Judicial Services
[X] Judy Smith, Secretary

Re: ***Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited et al and (Capitalink, L.C.)***
Court File No. 06-CL-6820

Attached please find Regional Senior Justice Leitch's Reasons for Judgment in the above-mentioned matter.

NUMBER OF PAGES INCLUDING COVER SHEET: [**15**]

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COURT FILE NO.: 06-CL-6820
DATE: 2007-08-01

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
TEXTRON FINANCIAL CANADA LIMITED Applicant	E. Patrick Shea, for the Applicant Textron Financial Canada Limited
- and -	
BETA LIMITEE/BETA BRANDS LIMITED Respondent	Steven Weisz, for the Respondent Sun Beta Brands
- and -	
BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242	Duncan Grace - solicitor for the moving party, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242
- and -	
MINTZ & PARTNERS LIMITED	Jeffrey J. Simpson - solicitor for Mintz & Partners Limited
- and -	
CAPITALINK, L.C.	Kenneth D. Kraft – solicitor for Capitalink, L.C.
	HEARD: July 19, 2007

LEITCH R.S.J.:

[1] Mintz & Partners Limited, (the "Receiver"), in its capacity as interim receiver and receiver of Beta Limited/Beta Brands Limited, ("Beta Brands"), applies for advice and directions in respect of the following:

> (A) The payment by the Receiver of a fee (the "Capitalink Fee") of US$120,000 being claimed by Capitalink, L.C. ("Capitalink") as a result of the successful

completion by the Receiver of a transaction (the "Bremner Transaction") to sell certain of the assets of Beta Brands to Bremner Food Group In. ("Bremner"); and

(B) The payment of $198,000 by the Receiver in key employee retention payments (the "KERP Payments") representing payments in the amount of $66,000 each being claimed by Mr. Robert Neable, Mr. Gary Musick, and Ms. Anita Varallo.

PART (A): THE CAPITALINK FEE

Background Facts

[2] Capitalink became involved with Beta Brands in the fall of 2004. At that time, Beta Brands established an agreement with Capitalink (the "Capitalink Agreement") to, *inter alia*, market its assets and property for sale. Beta Brands was required to pay Capitalink a fee based on the consideration received by Beta Brands from any transaction with a party introduced to it by Capitalink.

[3] Capitalink provided expert advice to Beta Brands from September 2005 to December 2006. It investigated several marketing options for Beta Brands and prepared information memoranda to be made available to prospective purchasers.

[4] As a result of Capitalink's marketing efforts, Ralcorp Holdings submitted a purchase proposal in March 2006. Bremner, the subsidiary of Ralcorp, executed an Asset Purchase Agreement on December 13, 2006.

[5] The Receiver was appointed interim receiver and receiver of all assets, undertaking and property of Beta Brands on January 3, 2007. The Receiver subsequently brought a motion for approval of the Bremner Transaction. The order approving the transaction was given on January 5, 2007. In its Reasons, the court described the transaction as "fair and reasonable" producing "a provident sale."

[6] There is no issue that, as set out in the Pre-Receivership Report and the Receiver's First Report the Receiver relied exclusively on Capitalink's marketing efforts and reports in recommending that the court direct the Receiver to complete the Bremner Transaction.

[7] There is also no issue that, in accordance with the contractual arrangements between Beta Brands and Capitalink, Capitalink is entitled to be paid the Capitalink Fee. The issue in contention here is whether the obligation to pay the Capitalink Fee extends to the Receiver.

Positions Advanced on this Motion

[8] Mr. Shea, on behalf of Textron, Beta Brands' primary secured creditor, took the position that the Receiver adopted Capitalink's marketing, the court relied on Capitalink's marketing efforts and the Capitalink Fee ought to be paid. He asserted that the principles of unjust enrichment apply to these circumstances – namely that (1) reliance and enrichment, (2) deprivation and (3) an absence of juristic reason for the enrichment are made out on these facts. He pointed out that the commission fee was always factored into the cash flows presented in

connection with the Bremner Transaction, and it was always assumed that the commission would be paid.

[9] Mr. Kraft, on behalf of Capitalink, noted that both the Receiver and secured creditor wish to pay the fee, however, his position was that the Receiver was bound by the contract with Capitalink because the Receiver had adopted it by its actions. The quantum meruit claim put forward by Mr. Shea is relied upon as an alternative position. Essentially, Capitalink's position is that the Receiver is bound by the agreement with Capitalink by virtue of the fact that the deal was closed or, alternatively, it is just and equitable for the Capitalink Fee to be paid.

[10] Capitalink pointed to the Receivership Order dated January 3, 2007 in support of its position. This Order authorized the Receiver to engage consultants and experts to assist with the exercise of its powers and duties and to market any or all of Beta Brands' property.[1] The Receivership Order also included a provision relating to the expenditures or liability incurred by the Receiver in the course of fulfilling its duties:

> RECEIVER'S ACCOUNTS
>
> 17. THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trust, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").

[11] Capitalink submitted that its marketing efforts enabled the Receiver to comply with its obligation to deal with Beta Brands' property in a "commercially reasonable manner." Capitalink states that if its work had not been performed, the Receiver would have had to conduct a marketing process itself or retain someone else to do so to fulfill its statutory obligation under the *BIA*. Any fees incurred by such marketing would have been covered by the Receiver's Charge included in the Receivership Order. Yet, in this case, the Receiver did not incur any fees because of reliance on Capitalink. It is Capitalink's submission that this creates an unjust result.

[12] Capitalink also pointed to the Receiver's obligation to act fairly and honestly on behalf of all of the parties that have an interest in the property of Beta Brands. The decisions in *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, (2001) 25 C.B.R. (4th) 198 (Super. Ct.) ("*Armadale*") and *Panamerica de Bienes y Servicos, S.A. v. Northern Badger Oil & Gas Ltd.*, (1991), 8 C.B.R. (3d) 31 (Alta. C.A.) ("*Panamerica*") are submitted in support of this position. According to Capitalink, the Receiver would not be complying with its obligations to act honestly and in good faith if it was entitled to rely on Capitalink's efforts without paying the Capitalink Fee.

[13] The Receiver took the position that it would be dishonourable to resile from Capitalink's claim for the Capitalink Fee, citing *Armadale, supra*, and placing considerable emphasis on paragraph 15 which provides as follows:

---

[1] These powers are found specifically within paragraphs 3(d) and 3(k) of the Receivership Order

> The trustee is an officer of the court and must act fairly to all parties with an interest in the estate. It would be dishonourable for the trustee to disclaim this contract. I therefore find that the trustee is bound by the contract in the same manner and to the same extent as the bankrupt was at the time of the bankruptcy and has no power to disclaim the contract.

[14] Mr. Grace, on behalf of Local 242, opposed payment of the Capitalink Fee. He did not seek to minimize in any way the work performed by Capitalink but asserted that Capitalink was not entitled to the priority it sought. As Mr. Grace pointed out, there was no authority advanced for the proposition that this unsecured claim of Capitalink should have any priority. In addition, the fact that this payment was reflected in the cash flows presented in the Pre-Receivership Report does not amount to a court endorsement of such payments.

[15] Mr. Grace noted that Mr. Shea's position was that the Capitalink Fee should be paid on a quantum meruit basis and he did not advance the position of Mr. Kraft that the Capitalink Fee was a direct obligation of the Receiver. Further, Mr. Grace noted no restitution principles had been cited in any of the materials filed on the motion.

[16] In reply, Mr. Shea and Mr. Simpson, on behalf of the Receiver, stated that it was always expected and assumed that the Capitalink Fee would be paid because its work had been relied upon and the fee was fair and reasonable.

[17] Mr. Simpson further noted in reply that it always intended to pay the Capitalink Fee and such payment was part of the motion relating to the approval of the Bremner Transaction, however, because of the objections of Local 242, that motion was carved back to the bare minimum, leaving three outstanding issues – a distribution to Textron (which has since been resolved on consent by an interim distribution order made March 1, 2007), the payment of the Capitalink Fee, and the KERP payments.

[18] The issues that must be addressed then, in assessing whether the Receiver is bound by the Capitalink Agreement and therefore required to pay the Capitalink Fee are as follows:

> 1) Has the Receiver, by virtue of its conduct, adopted the arrangements with Capitalink thereby obligating itself to Capitalink? and
>
> 2) Does quantum meruit apply such that the Receiver is required to pay the Capitalink Fee?

(1) Has the Receiver Adopted the Arrangements with Capitalink?

Relevant Legal Principles

[19] Section 14.06(1.2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") addresses the liability of a trustee or receiver as follows:

> Notwithstanding anything in any federal or provincial law, where a Trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any

> claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

[20] The section establishes that a receiver is not personally bound or in any way liable under pre-receivership contracts. An exception to this principle arises where there is evidence that the receiver adopted or otherwise agreed to be personally bound by the agreement. See *Howlett v. 512046 B.C. Ltd.* (2000), 17 C.B.R. (4th) 224 (B.C.S.C.) ("*Howlett*"). As a result, if the claim involved is one for commission on the sale of an insolvent debtor's property, that claim will remain enforceable against the contracting party, but is an unsecured claim in the seller's estate. See *Howlett, supra.*

[21] Although the receiver is not generally bound under pre-receivership contracts in accordance with s. 14.06(1.2), the receiver must still comply with certain statutory obligations to act honestly, in good faith and in a commercially reasonable manner. These obligations are set out in s. 247 of the *BIA* as follows:

> 247. A receiver shall
>
> (a) act honestly and in good faith; and
>
> (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

[22] Case law has emphasized the obligation of the Receiver to act fairly on behalf of all interested parties. As noted, in *Armadale, supra,* Lax J. described the duty of a Trustee in Bankruptcy at paragraph 15 as a duty to "act fairly to all parties with an interest in the estate." This principle is further emphasized in *Panamerica* at para. 38:

> A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances.

Analysis and Conclusions

[23] Although Capitalink is correct in law in setting out the requisite statutory obligations with which the Receiver must comply, such obligations fail to govern the issue involved here, that being priority to payment under the receivership. The Capitalink claim is unsecured and therefore retains no priority to payment within the receivership scheme. As such, Capitalink's claim remains enforceable against Beta Brands, but exists as an unsecured claim in the context of the receivership. The decisions submitted by Capitalink in respect of the Receiver's obligations are distinguishable as they do not involve priority disputes and fail to address the principles limiting the liability of a receiver as set out in section 14.06(1.2) of the *BIA*.

[24] In *Armadale, supra,* Deloitte & Touche Inc, in its capacity as Construction Lien Trustee and as Trustee in Bankruptcy brought a motion for direction on whether or not to perform an agreement where the estate would receive no benefit from the transaction. The court directed the

Trustee to complete the transaction. Lax J. pointed to s. 75 of the *BIA*, which prevents a trustee from disclaiming a contract: "An agreement for sale in favour of a bona fide purchaser or mortgagee for valuable consideration is valid and effectual as if no receiving order had been made." See: *Armadale, supra* at para. 11.

[25] Lax J. further asserted that even if s. 75 did not apply, the trustee had no right to terminate property rights that had passed under contract prior to the bankruptcy. This determination was based on the equitable interest of the purchaser and the principle of specific performance.

[26] These were the primary reasons that the court in *Armadale* ordered the Trustee to proceed with the transaction. The decision did not turn simply on the Trustee's obligations to act fairly to all parties with an interest in the estate. In addition, unlike the circumstances in this case, an agreement of purchase and sale for land was involved in which equitable title had already passed to the purchaser prior to the bankruptcy. This was a significant feature that influenced the court's ultimate determination.

[27] It is my view that the principles established in section 14.06(1.2) of the *BIA* govern the result in this motion. The Agreement of Purchase and Sale was executed *before* the Receiver was appointed. The Receiver's reliance on Capitalink's marketing efforts after its appointment was conduct in accordance with its statutory obligation to act in a commercially reasonable manner. There is no evidence which establishes that the Receiver adopted or agreed to be personally bound by the terms of the Agreement.

[28] Further, the court order approving the Bremner Transaction did not represent an adoption of, nor did it have the effect of, imposing personal liability on the Receiver for the payment of the commission required pursuant to the Capitalink Agreement. To suggest otherwise would create a result that operates in contrast to the policy interests underlying section 14.06(1.2) designed to insulate receivers from pre-appointment matters that would expose them to liabilities and have the effect of rendering the receivership unviable.

[29] In consequence of this conclusion, Capitalink's unsecured claim ranks with all other unsecured claims to which Beta Brands is subject. The Receiver is not bound by the Capitalink Agreement and is not obligated to pay the Capitalink fee.

(2) Quantum Meruit Claim

Relevant Legal Principles

[30] As an alternative position, Mr. Shea asserted that the principles of unjust enrichment apply and thereby obligate the Receiver to pay the Capitalink Fee. However, this alternative position was not advanced in the materials filed on this motion and no restitutionary principles were cited in any materials.

[31] It is a well-established principle that judges should not decide matters in respect of which the parties have not had an opportunity to make submissions. For example, in *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 at para. 60, the Court of Appeal stated: "It is fundamental to the litigation process that lawsuits be decided within the boundaries of the

pleadings." However, a number of courts have adjudicated on issues of quantum meruit even though they were not specifically pleaded.[2] For example, in *Ram Industrial Equip. (Toronto) Ltd. (c.o.b. Pioneer Ram Construction) v. Kolson*, [1998] O.J. No. 4531 (C.A.), at trial, the judge heard submissions on the issue of quantum meruit even though it had not been included within the pleadings. The trial judge determined that it could properly adjudicate quantum meruit because it had been canvassed throughout the trial and its consideration did not prejudice the defendant. The Court of Appeal affirmed the trial judge's ruling, finding no evidence of prejudice, and ample evidence that the defendant was aware of the quantum meruit issue and had had the opportunity to make submissions on it at trial.

[32] In essence, quantum meruit may be adjudicated despite not being sufficiently pleaded in circumstances where there is no prejudice to the opposing party, that party is aware of the issue and was given the opportunity to make submissions on it before the court.

[33] Restitutionary quantum meruit is based on principles of unjust enrichment. It may be applied where no contractual relationship exists between the parties, and one party performed services for the other, which benefited that party, on a reasonable expectation that the services were compensable.

[34] It is well established that for a claim of unjust enrichment to succeed, there must be:

a. an enrichment;
b. a corresponding deprivation; and,
c. an absence of any juristic reason for the enrichment or non-payment.

[35] In *Consulate Ventures Inc. v. Arnico Contracting & Engineering (1992) Inc. et al.*, 2007 ONCA 324, Madam Justice Cronk stated the following in respect of quantum meruit and unjust enrichment at para. 99:

> ...where the claim for restitutionary relief is based on quantum meruit...an explicit mutual agreement to compensate for services rendered is not a prerequisite to recovery. It suffices if the services in question were furnished at the request, or with the encouragement or acquiescence, of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services.

Analysis and Conclusions

[36] Mr. Shea's submissions in respect of quantum meruit should have been included within the materials filed on the motion. He failed to do this or draw the court's attention to any case law in which the principle of quantum meruit was applied successfully against a Receiver. Nonetheless, Mr. Shea and Mr. Grace made submissions on this issue and the quantum meruit argument will be considered in this analysis.

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[2] See: *Hoffer v. Verdone*, [1994] O.J. No. 1967 (Gen. Div.); *Honey-Bee Sanitation Inc. v. Essex (County)*, [1993] O.J. No. 178 (Gen. Div.); *Hill v. Develcon Electronics Ltd.*, [1991] S.J. No. 311 (Q.B.); *Johnson v. H.G. Precision Machine Ltd.*, [1991] B.C.J. No. 843 (S.C.); *Aurora Development Ltd. v. Paradise (Town)* (1991), 90 Nfld. & P.E.I.R. 5 (T.D.).

[37] In this case, Capitalink and the Receiver did not enter into a contract and, as previously determined, the Receiver was not bound by the agreement. Rather, the contract that was established existed between Capitalink and Beta Brands only. This leaves open the possibility for the application of restitutionary quantum meruit and a consideration of the principles of unjust enrichment.

[38] It is my view that the requirements for unjust enrichment and the application of the quantum meruit remedy have not been established in this case.

[39] In completing the sale, the Receiver relied on the marketing efforts of Capitalink, thereby avoiding having to undertake any independent marking activities. The Receiver did not have to personally engage additional consultants or experts to assist with the sale or market any of the property through advertising or soliciting offers. The conduct of Capitalink clearly benefited the Receiver thereby satisfying the first essential requirement for an unjust enrichment claim.

[40] The second consideration within the unjust enrichment analysis is whether there has been a corresponding deprivation. There is no issue that Capitalink is entitled to be paid the Capitalink Fee in accordance with its contractual arrangements with Beta Brands. The receivership status of Beta Brands means that there is a possibility that Capitalink will be deprived of payment. However, this deprivation does not correspond to the conduct of the Receiver, but rather, to the financial status of Beta Brands. Thus, it appears that the second requirement for the unjust enrichment has not been satisfied.

[41] The difficulty that arises in respect of Capitalink's claim is that the efforts rendered by Capitalink did not create a reasonable expectation that such were compensable by the Receiver. Capitalink's arrangement for payment extended only to Beta Brands. Capitalink engaged in marketing efforts in order to fulfill the contractual agreement established with Beta Brands. The court order approving the Bremner Transaction is insufficient to establish a reasonable expectation that the Receiver should compensate Capitalink for its efforts.

[42] In addition, this is not a situation where there is an absence of a juristic reason for the enrichment. The Receiver had an obligation to deal with Beta Brands' assets in a commercially reasonable manner. In relying on the marketing efforts of Capitalink, the Receiver was simply complying with this obligation. In my view this represents a sufficient juristic reason for non-payment.

[43] Thus, the requirements for the claim of unjust enrichment and quantum meruit have not been satisfied. Although the marketing efforts of Capitalink were relied upon by the Receiver, there was no expectation that Capitalink would receive payment for such efforts and the circumstances of Beta Brands (existing in a state of receivership) do not render it unjust for the Receiver to retain the benefit conferred by the provision of those services in this case.

PART (B): The KERP Payments

Background Facts

[44] There had been seven senior management positions in Beta Brands but by the fall of 2006, only three remained – Mr. Neable, Mr. Musick and Ms. Varallo (the "Key Employees"). Mr. Neable was Vice President, Finance and a director and officer of Beta Brands. Mr. Musick was the President and a director and officer of Beta Brands. Ms. Varallo was the Vice President of Logistics and Beta Brands.

[45] As a result of uncertainty concerning the future prospects of Beta Brands, the Key Employees were provided with letters from Beta Brands setting out severance arrangements. The payments included within these letters ranged from $50,000 to $249,000 if the addressee continued in their employment with Beta Brands and the addressee's employment was terminated without cause.

[46] As a result of these letters, the Key Employees continued to carry out their duties and responsibilities until the termination of the employment in January 2007. During their time of employment, the Key Employees performed extensive work in respect of the Bremner Transaction, which included arranging for meetings with members of the Ralcorp team and liaising with Ralcorp executives and engineers to satisfy concerns on the part of those parties with the ability of Beta Brands to achieve an inventory build required by the purchaser.

[47] A KERP arrangement was never solidified between the parties. The Key Employees rely on the fact that the secured creditors agreed that the incentive payments totalling $166,000 would be included in the cash flows relating to the Bremner Transaction and would be paid on the closing of the Bremner Transaction. To date, the Receiver has not undertaken to make the KERP Payments, but rather, applies for advice and direction on that point to this court.

Positions Advanced on the Motion

[48] The Receiver, Textron and Sun Beta support an order authorizing and directing the Receiver to pay to each of Mr. Neable, Mr. Musick and Ms. Varallo the amount of $66,000. These payments would be made from the realization of the Beta Brands' assets and thus are approved by the secured creditors with the *prima facie* right to receive such proceeds of realization.

[49] Mr. Shea, on behalf of Textron, pointed out that a shortfall to Textron and Sun Beta is likely. However, Textron and Sun Beta do not object to the KERP Payments being made from the proceeds of realization of the Beta Brands' assets because they consider the management team a key part of the conclusion of the Bremner Transaction. The management team was essential to the inventory build, a key aspect of the arrangements with Bremner. Mr. Shea asserted that these payments were, in essence, a reward when the deal closed for getting the job done and he asserts that it was appropriate business judgment that Beta Brands enter into these arrangements.

[50] Mr. Weisz confirmed Sun Beta's position that there was no contract between Textron or Sun Beta and the key three employees and thus no liability to those individuals. However, both secured creditors were consulted regarding these arrangements and did not object to the KERP payments being made out of the cash flow from the closing of the Bremner Transaction.

[51] Mr. Simpson, on behalf of the Receiver, took the position that the Receiver should not disclaim these arrangements and, as a matter of commercial reasonableness and morality where the Receiver relies on third parties and consultants, they should be paid. As he indicated, it may be that such payments would have the effect of "jumping the queue" but the Receiver did not view that as a compelling factor to not authorize the payments considering the Receiver's use of the efforts of the employees. He referred, again, to *Armadale, supra.*

[52] Mr. Highley, on behalf of the employees, asserted that the KERP Payments are not a severance payment in any way and he noted that if the plant had shut down in October and the employees had not succumbed to inducements, the Bremner Transaction could not have been negotiated and there would have been no way to complete the inventory build and more than likely the Receiver would have been appointed much earlier at significant expense. He asserted that the contributions of the three senior managers reduced realization costs; they assumed extraordinary duties and extensive workload; and their efforts generated a large amount of money. His position was that their claimed fee is fair and reasonable, particularly given that these three employees not only ran the plant, but created the conditions for the sale to Bremner and indeed "shepherded" the deal from the original negotiations to conclusion.

[53] Mr. Highley asserted that the payment to these Key Employees could be justified on the basis of: (a) inducement; (b) realization; (c) costs of realization; and (d) work load. However, Mr. Highley was unable to draw the court's attention to any case law that supported his argument seeking the KERP payments.

[54] Mr. Grace, on behalf of Local 242, emphasized that the issue is whether the Receiver has the authority to make the KERP Payment out of the realization proceeds in these circumstances, where such payment will in all probability increase the deficiency to Textron and Sun Media and thus increase the probability that there will be no proceeds available to the unsecured creditors, including but not limited to the employees of Beta Brands.

Relevant Legal Principles

[55] KERP arrangements, also referred to as "pay to stay" compensation plans, are typically the subject of careful review before being paid out. This principle applies even in the context of a restructuring process designed to preserve the debtor and its business:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements…Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly.

> Because any KERP arrangement is intended to secure key personnel for the duration of the restructuring process, the additional compensation offered to the affected employees should be deferred until after the restructuring or sale of the business or assets has been completed. In many cases, employees will require staged "stay bonuses" that are payable at specified times in the future if they stay until that time.
>
> *Re Warehouse Drug Store Ltd.*, [2006] O.J. No. 3416 at para. 14 (Super. Ct.) ("*Warehouse Drug Store*") referring to Kevin McElcheran, *Canadian Insolvency in Canada* (LexisNexis-Butterworths) at 231.

[56] The court in *Warehouse Drug Store, supra,* accepted these principles, but determined that the circumstances involved in that case could be distinguished based on the facts. In that case, the court dealt with a motion to determine whether the former CFO of Warehouse Drug Store Ltd., ("Warehouse"), should be entitled to recover a "retention bonus" established within the terms of a termination agreement. The CFO was persuaded by this agreement to forego alternative employment he had acquired and remain employed with Warehouse during its restructuring process which subsequently turned into a realization process.

[57] After Warehouse filed under the *Companies' Creditors Arrangement Act,* the termination agreement was made known to the Monitor but was not noted in any Monitor's report until after the transaction that triggered the CFOs termination was in process. Despite this error, Campbell J. ordered the payment of the retention bonus, asserting at paragraph 9 that it was "reasonable to infer that had the issue of the termination agreement been included in a report to the Court soon after the appointment of the Monitor, it would likely have been approved."

[58] Mr. Grace referred to the principles established by American case law in respect of KERP payments and specifically the decision in *In Re Global Home Products, LLC et al.* Case No. 06-10340 (Delaware Bankruptcy Court), which established the requirements that must be satisfied before the court can approve a "pay for value" compensation or incentive plan:

a. there is a reasonable relationship between the plan proposed and the results to be obtained;

b. the cost of the plan is reasonable in the context of the debtor's assets, liabilities and earning potential;

c. the scope of the plan is fair and reasonable in that it either applies to all employees or treats them differently for rational and fair reasons;

d. the plan is consistent with industry standards;

e. the debtor has undertaken a reasonable investigation to determine the need for an incentive plan, has analyzed which key employees need to be incentivised and what is generally applicable in a particular industry; and

f. the debtor received independent counsel in performing the diligence and in creating and authorizing the incentive compensation or, alternatively, there were good and valid reasons why such independent counsel was not utilized or needed.

[59] It is noteworthy to point out that the payment of KERPs in the United States is governed by restrictive legislation that require insolvent debtors to satisfy rigorous standards before the court can approve the payment of KERPs or severance payments to insiders of an insolvent company. Equivalent legislative principles have not been established in Canada. In addition, the principles established in *Global Home Products, supra,* have not been adopted by Canadian case law.

Analysis and Conclusions

[60] It is apparent that the circumstances involved in *Warehouse Drug Store, supra,* are distinct from those involved in this case. Unlike the CFO in that decision, there has been no suggestion that any of the Key Employees had alternative employment opportunities that they chose to forego upon receipt of the letters setting out the severance arrangement or when the Bremner Transaction was in play. Further, Beta Brands did not reorganize during the relevant period of time. The efforts of these three employees were designed, seemingly, to ensure that the Bremner Transaction could be completed on terms acceptable to Textron.

[61] Despite these distinctions, the principles enunciated by the court in respect of the KERP payments remain applicable and relevant to these proceedings. The proposed KERP payments in this case must be subject to careful scrutiny.

[62] In this case, the court is being asked to approve KERP payments for which there is no contractual basis. Such payments have not been reviewed by the Receiver, nor has the Receiver submitted any comment in respect of these payments in any report. In addition, the extent to which the services rendered by these employees went beyond their normal duties as salaried members of senior management is unclear.

[63] As a result, there is a very thin evidentiary record before the court. I agree with Mr. Grace that these former employees, who worked to get the Bremner Transaction completed and to build the inventory are attempting to "jump the queue" of unsecured creditors in advancing this claim.

[64] In addition, the circumstances indicate that the payments sought by these employees are more in the nature of a severance payment than a KERP payment. As noted, a KERP agreement was never concluded between the parties. The payments were arranged at a time when Beta Brands had written severance arrangements in place. Thus, the payments are in substance payments in lieu of severance and were designed to replace those severance arrangements.

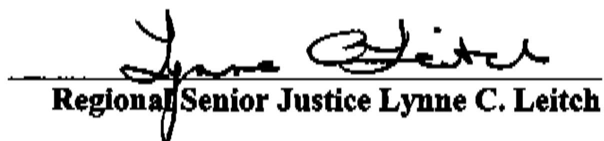
[65] Even if the payment in issue is properly characterized as a KERP, it is not entitled to statutory priority or preference. In essence, those who support the payment being made now rely on the fact that the payment was reflected in the cash flow projections that were acceptable to the largest secured creditors.

[66] For these reasons, it seems to me that it is inappropriate to order the Receiver to make the payments requested by Mr. Neable, Mr. Musick and Ms. Varallo. There is no legal basis for them to acquire priority over other creditors including other employees seeking termination and severance pay.

SUMMARY OF CONCLUSIONS

[67] Capitalink's request for an order authorizing and obligating the Receiver to pay the Capitalink Fee is denied. The Receiver is not bound by the Capitalink Agreement and therefore not obligated to pay the Capitalink Fee. Capitalink's unsecured claim ranks with all other unsecured claims to which Beta Brands is subject.

[68] The Receiver is not obligated to make the payments in the amount of $66,000 each being claimed by Mr. Neable, Mr. Musick and Ms. Varallo (the KERP Payments).



Regional Senior Justice Lynne C. Leitch

Released: August 1, 2007.

Court File No.: 06-CL-6820
Date: August 1, 2007.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TEXTRON FINANCIAL CANADA LIMITED

Applicant

- and -

BETA LIMITEE/BETA BRANDS LIMITED

Respondent

- and -

BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242

- and -

MINTZ & PARTNERS LIMITED

- and -

CAPITALINK, L.C.

REASONS FOR JUDGMENT

LEITCH R.S.J.

Released: August 1, 2007.